IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 129 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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DINESH @ DUNI SAVABHAI NADIYA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 129 of 2001

MR HR PRAJAPATI for Petitioner No. 1

MR HL JANI ASSTT GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 03/07/2001

ORAL JUDGEMENT

#. Heard Mr.H.R.Prajapati, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP for respondents. In the present petition, the order of detention dated 25th November, 2000 has been challenged by the present petitioner under Article 226 of the

Constitution of India. The order of detention has been passed by the police Commissioner, Ahmedabad City under section 3[1] of the PASA Act. The present petitioner has been detained at Surat Jail as Class-II detenu and the grounds of detention are communicated and supplied to the present petitioner by the detaining authority under Section 9[1] of the PASA Act. According to the grounds of detention, one offence has been registered against the present petitioner on 28th September, 2000 and accordingly the petitioner has been considered as the dangerous person under Section 2[c] of the PASA Act. However, two unregistered offence dated 1st November, 2000 and 5th November, 2000 reported against the present petitioner and statement of secret witnesses are recorded on 21st November, 2000 and 22nd November, 2000 and the same has been verified by the detaining authority on 24th November, 2000. The petitioner has raised this contention in the grounds raised in the petition, in ground [l] and [s] on page 9 and 13 respectively and the detaining authority has filed reply.

#. Learned advocate Mr.H.R.Prajapati, appearing on behalf of the petitioner raised various contentions challenging the detention order but according to him, two contentions are enough to vitiate the order of detention. The first contention which has been raised by the learned advocate that at the time of passing the detention order, the petitioner was in police custody on remand as mentioned on page-20 in grounds of detention. So far the second contention is concerned, it is contended that the statement of the secret witnesses has been verified by the detaining authority on 24th November, 2000 and on the next date, the order of detention has been passed mechanically and without application of mind by the detaining authority. Therefore, he relied upon two decisions of the Apex Court reported in 1985 [4] Supreme Court 232 and 2000 [1] SCC 341 and 2000 [3] GLR 2696.

#. Learned AGP Mr.H.L.Jani appearing for respondents has submitted that a detailed affidavit has been filed by the detaining authority and he relied upon para-5 of the reply. Mr.Jani, learned AGP has submitted that the detaining authority has passed detention order after considering all the materials on record an after verifying genuineness of the statements of the secret witnesses and the detaining authority has applied its mind and after considering all the materials, the detention order has been passed. Therefore, according to the learned AGP Mr.Jani, the detention order has been rightly passed by the detaining authority which is legal

and valid one and does not require any interference of this Court.

#. I have considered the arguments of the learned advocates for the respective parties. I have considered the two contentions raised by the learned advocate Mr. Prajapati, that at the time of passing of the order of detention, the petitioner was in police custody.

In case of Ramesh Yadav v. District Magistrate and another (supra), the apex court has observed as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

#. In light of the said decision, considering the facts of this case, there is no observations made by the detaining authority in the grounds of detention that any bail application has been filed by the petitioner in respect of the offence registered against him. There is no averment to that effect and there was no material with the detaining authority to have the reasonable apprehension of the petitioner's release on bail after completion of the period of remand and to indulge in the same activities again after release on bail.

In case of Amratlal and others versus Union of India (supra), the apex court has observed that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then,

the detaining authority must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain. Therefore, in view of the observations made by the apex court and looking to the facts and circumstances of the case, there is no observation made by the detaining authority in the grounds of detention that there was application filed by the petitioner for his being released on bail in respect of the offences registered against the petitioner under the Bombay Prohibition Act.

There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. In view of such non application of mind on the part of the detaining authority, subjective satisfaction is not established, looking to the facts of the present case.

However, learned advocate Mr. Jani has relied upon the decision of the division bench of this court reported in 1988 (2) GLH 475 in case of Nasimbanu. Now, this decision is in respect of lesser drastic remedy of cancellation of bail and the division bench of this court has held that the non consideration of this aspect of cancellation of bail as a lesser drastic remedy would not amount to non application of mind. Thus, the facts of the present case are different. Therefore, this decision is not helpful to the State. However, Mr. Jani has also relied upon the decision of the full bench of this court in special civil application no. 9579 of 2000 dated 4.5.2001. In para 41, Full Bench of this Court has considered the decision of the apex court in case of Amratlal and another versus Union Government (supra). The observations made by the full bench are that this decision shows that the detention order can be passed even though the detenu is in judicial custody if there is cogent material to indicate that he is likely to be released on bail. There is no dispute on this legal proposition that while the detenu is in judicial custody, order of detention can be passed but one aspect is also required to be kept in mind that there must be some cogent evidence to indicate that the detenu is likely to be released on bail and in absence of such material, subjective satisfaction cannot be said to have been established. In the instant case, such subjective

satisfaction has not been established. Therefore, this decision of the full bench and also the decision of the division bench in 1988 (2) GLH 475 are not helpful to the respondent State in the facts and circumstances of the present case.

#. I have also considered the decision reported in 2000(3) GLR page 2696. Relevant observations are as under:

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659, the Court observed:

The statements of the three witnesses in the instant case which were recorded before the [police inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August, 1999 the detention order has been passed. (Para. 9).

The manner in which the verification has been recorded of the made by these three witnesses for the purpose of section 9(2) shows that the same has been done only as an empty formality in as much as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege

under Section 9 (2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power u/S. 9(2) and it is established that in such case the wrong exercise of power u/S. 9(2) adversely affects detenu's right of making an effective representation guaranteed under Article 22(5) of the Constitution of India. (Para. 9).

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege u/S. 9(2) of the PASA Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e. on the next day to the date on which the materials were considered by the detaining authority."

Looking to the observations made hereinabove, according to my opinion, the impugned order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 25th November, 2000 is vitiated and resulted to quash and set aside. The detenu - Dinesh Duni Savabhai Nadiya who has been detained at the Surat Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

Dt.3.7.2001. (H.K. Rathod,J.)

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